SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 33.

DEPOSIT BANK OF FRANKFORT.....Plaintiff in Error.

vs.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.....Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

If the decree of June 25th, 1898, relied on as an estoppel herein, were a judgment of a State Court of Kentucky, the case of Phœnix Insurance Co. vs. Tennessee, 161 U. S., 174, would be conclusive against the said claim of estoppel. But said decree having been rendered by the United States Circuit Court for the District of Kentucky, it remains to be determined whether or not the Kentucky Court of Appeals has given full faith and credit and the proper effect to the said decree, as required by the Constitution and laws of the United States.

What effect, as an estoppel, should the courts of Kentucky give to said decree of June 25th, 1898? The answer is, that the courts of Kentucky should give to said decree the same effect as an estoppel as if it were a State court judgment of Kentucky.

In Metcalf vs. Watertown, 153 U. S., 676, this Court said:

"In Dupasseur vs. Rocheran, 21 Wall., 130, 135, Mr.

Justice Bradley, speaking for the Court, said: 'The only effect that can be justly claimed for a judgment in the Circuit Court of the United States is such as would belong to judgments of the State courts rendered under similar circumstances; and it is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances.' The same views were expressed by this Court through Mr. Justice Mathews in Embrey vs. Palmer, 107 U. S., 7, 9, 10; Crescent Live Stock Co. vs. Butcher's Union, 120 U. S., 141, 146, 147. It can not be doubted that, in respect to their effect under section 905, the judgments and decrees of the Circuit Courts of the United States are entitled to the same sanctity and effect in the courts of each State, when those courts are held within the State, as their own judgments, nothing more, but nothing less."

Though the said decree of 1898 was rendered by a Federal Court, it was rendered in Kentucky, and in a controversy between citizens of Kentucky, and should be regarded as a domestic judgment of the State of Kentucky, at least for the purposes of this case. (Metcalf vs. Watertown, 153 U. S., 680.)

It remains, then, only to determine what effect should be given the said decree of June 25th, 1898, if the same were a State Court judgment of Kentucky.

The substance of the appellant's contention is that, because his honor Judge Taft held, on rendition of said decree, that the Hewitt Law never did constitute an irrevocable contract between the state and any bank which accepted the same, the City of Frankfort is now estopped from denying the existence of such irrevocable contract. So far as the adjudication, by his honor Judge Taft, that the city of Frankfort was estopped by the unreversed judgment of the Franklin Circuit Court (of February 1st, 1896) is concerned, that adjudication is wholly foreign to this case. The plaintiff in error is not now relying upon any plea or claim of estopped by reason of said Franklin Circuit Court judgment.

The decree of 1898 was in a litigation as to taxes for 1895 to 1898, inclusive. This case involves only the taxes for 1893 and 1894, and interest thereon.

The said former litigation, therefore, having been concerning a different "*demand*" from that involved in this action, the parties to this action could only be estopped by the said former decree upon the principal of "*estopped by former verdict*" announced by this court in the case of Cromwell vs. Sac, 94 U. S., 315—that is, by a determination, in said former litigation, of some issue of fact which is presented for decision in this action; and, since neither of the two issues determined in said former litigation (namely, that as to contract, and that as to estopped by the Franklin Circuit Court judgment) is now presented for decision in this action, the claim of estoppel herein is untenable and unfounded. With deference to counsel on the other side, we are unable to see any semblance of ground for the contention, that the city of Frankfort is estopped herein by the said decree of June 25th, 1898.

There is no proposition, either of law or of fact, upon which the city of Frankfort now relies, or that is necessary to its recovery herein, which is inconsistent with any finding of the said decree.

The only proposition on which the city of Frankfort now relies, or ever relied herein, and the only proposition that is or was ever necessary to its recovery herein is, that the Hewitt law never constituted an irrevocable contract between the State and a y bank which accepted the same. The said decree does not controvert that proposition. On the contrary, when viewed in the light of Judge Taft's opinion in support thereof, it sustains that proposition. Besides, that proposition is now *res judicata* herein by the first decision of the Kentucky Court of Appeals herein, from which no writ of error was ever or can now ever be prosecuted. Then suppose it were conceded that said decree was an adjudication of irrevocable contract, as contended by this bank, what is the result? This Court would then be confronted with two inconsistent final adjudications—one by the Kentucky Court of Appeals and the other by the United States Circuit Court for the District of Kentucky. Each of those adjudications is as potent as an estoppel as the other—the two neutralize each other—and the said question of contract is set at large. (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

But, in addition to the said *res judicata* in the Kentucky Court of Appeals, and in addition to the fact that the said decree of 1898 was not an adjudication that the Hewitt law was an irrevocable contract, that decree was in a litigation as to taxes

for the years 1895 to 1898, inclusive, while this case involves only taxes for 1893 and 1894, and interest thereon. Said decree is, therefore, only conclusive in Kentucky as to the taxes for 1895 to 1898, inclusive.

It is now well settled in Kentucky, by more than a dozen decisions of the Kentucky Court of Appeals, that an adjudication in a litigation as to one year's taxes is not conclusive in a subsequent litigation as to any other year's taxes (the two suits being between the same parties and under the same law). (For Kentucky authorities on that subject, see original Brief for Defendant in Error, filed herein, pages 5, 6, 7, 8 and 9) See also, on same subject, recent opinion by his honor Judge Cochran, of the United States Circuit Court for the Eastern District of Kentucky, in First National Bank of Covington vs. The City of Covington, now in this Court on appeal, and docketed as case No. 414, said opinion being on pages 96 to 102 of the printed Transcript of Record.

In said opinion, his honor Judge Cochran declares the rule of law in Kentucky, on that subject, to be as above stated in this Brief. The said rule of law, as to the effect of former judgments in tax cases, is the same in Kentucky as in the state of Tennessee. Hence, the recent opinion of this Court, by his honor Chief Justice Fuller, in the case of Union and Planters Bank vs. Memphis, Supreme Court Reporter, Vol. 23, No. 12, page 604 (decided last spring) is conclusive against the claim of estoppel herein—independently of the general principles of estoppel by *res judicata*.

The Court of Appeals of Kentucky, in its last opinion herein, has given to the said decree of 1898 the same effect as an estoppel which that Court would have given said decree had it been a State Court judgment of Kentucky. There is nothing in the Constitution or laws of the United States, or in the decisions of this Court, which requires that a judgment of a United States Circuit Court of Kentucky should have any greater or other effect as an estoppel than if it were a State Court judgment of Kentucky. We insist, however, as urged in our original Brief herein, that the said decree of 1898 having been based entirely upon an unreversed judgment of the Franklin Circuit Court while the same remained in full force and effect, and said Franklin Circuit Court judgment having since been reversed by the Court of Appeals, the said decree of 1898 should not now be enforced, because the foundation thereof has been destroyed, and the reason for the rendition thereof no longer exists. (See original Brief for Defendant in Error, page 12.)

In applying the law of estoppel the Chancellor will not exclude from his consideration the real *equity* of the case.

The estoppel insisted upon by the Plaintiff in Error would only result in defeating a just demand which should have been paid immediately after this Court held, in 1899, that this bank was not protected by contract from equal taxation under the revenue laws of Kentucky.

The only semblance of merit there ever was in this bank's defense herein was its original claim of contract rights. It having been determined by this Court, and by all the Courts of Kentucky, both State and Federal, that this bank never possessed any immunity from taxation by reason of irrevocable contract rights, the defense herein is entirely without real merit.

The Defendant in Error is entitled to recover herein its taxes under the *ad valorem* levies of 1893 and 1894, with legal interest thereon from August 22nd, 1894, until paid. We are not informed as to what damages the Defendant in Error will be entitled to in the event of affirmance of the judgment below. We ask that, in event of affirmance, this Court will award such damages to the Defendant in Error as, under the rules of Court, it may be entitled to.

We submit that the judgment of the Kentucky Court of Appeals herein should be affirmed with damages.

T. H. CROCKETT, City Attorney,
IRA & W. H. JULIAN,
For Defendant in Error.

AUTHORITIES.

1st. In the adjudication of 1898, relied on as an estoppel herein, his honor Judge Taft did not find nor hold that the Hewitt law constituted an irrevocable contract between the State and any bank which accepted the same. (Printed Transcript of Record herein, pages 148 to 152.)

2nd. The decree of June 25th, 1898, relied on as an estoppel herein, having been based entirely upon an unreversed judgment of the Franklin Circuit Court while it remained in full force and effect, and said Franklin Circuit Court judgment having since been reversed by the Court of Appeals, the said decree should not now operate as an estoppel between the parties thereto whose rights have been changed by the said reversal. (Galpin vs. Page, 18 Wallace, 374; Freeman on Judgments, 4th Ed., Vol. 1, Sec. 329, and authorities there cited.)

3d. After reversal of the Franklin Circuit Court judgment by the Court of Appeals, the said decree of 1898 should not be enforced, because the sole foundation of said decree was, by said reversal, destroyed, and the reason for the rendition thereof no longer exists. (C. & V. R. R. Co. vs. Fosdick, 106 U. S., 84; Butler vs. Eaton, 141 U. S., 243; Pennsylvania vs. Wheeling & Belmont Bridge Co., 18 Howard, 421; City of Newport vs. Newport Light Co., 14 Ky. L. Rep., 485.)

4th. The said decree of 1898 having been rendered in a litigation as to taxes of 1895 to 1898, inclusive, while this case only involves the taxes of 1893 and 1894 and interest thereon, said decree could only operate as an estoppel herein to the extent of some finding of fact in the former adjudication, which fact is in issue in this case. There being in this case no issue that was ever decided adversely to the city of Frankfort in any former case, there is no estoppel in this case. (Keokuk & Western Railroad vs. Missouri, 152 U. S., 314 and 315; Bigelow on Estoppel, 5th Ed., pages 80 to 103; Cromwell vs. Sac, 94 U. S., 315; New Orleans vs. Citizens Bank, 167 U. S., 371.)

5th. The contract issue was decided adversely to the Plaintiff in

Error, both by his honor Judge Taft, in said former litigation of 1898, and by the Kentucky Court of Appeals in its first decision of this case. If counsel on the other side will not concede that Judge Taft so decided, he will concede that the Court of Appeals so decided. If Judge Taft decided as counsel on the other side contend, then we have two contrary and inconsistent adjudications of said contract issue, which adjudications neutralize each other —"an estoppel against an estoppel sets the matter at large." (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

6th. A Federal Court judgment of Kentucky should be given the same effect as an estoppel as if it were a State Court judgment of Kentucky. (Metcalf vs. Watertown, 153 U. S., 676, and authorities there cited.)

7th. In Kentucky an adjudication as to one year's taxes is not conclusive in a subsequent litigation as to any other year's taxes (the two cases being between the same parties and under the same law). (For Kentucky authorities on this subject, see original Brief for Defendant in Error, filed herein, pages 5, 6, 7, 8 and 9.) See also, on same subject, recent opinion by Judge Cochran, of the United States Circuit Court for the Eastern District of Kentucky, in case No. 414, on docket of this term of this Court, Record, pages 96 to 102.

8th. The rule of law in Kentucky as to the effect of former judgments in tax cases is the same as in the State of Tennessee. Hence the recent opinion of this Court by his honor Chief Justice Fuller, in the case of Union and Planters Bank vs. Memphis, Supreme Court Reporter, Vol. 23, No. 12, page 604 (decided last spring), is conclusive against the claim of estoppel herein.